SUPREME COURT U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 966.

JOSEPH ROBERT CORRIGAN,
Administrator of the Estate of SHIRLEE ANN CORRIGAN,
Petitioner,

vs.

E. W. BOHREN TRANSPORT CO.,
Respondent.

MEMORANDUM CONTRA PETITIONER'S REQUEST FOR A WRIT OF CERTIORARI To the United States Court of Appeals For the Sixth Circuit.

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STATEMENT OF FACTS.

Respondent is unable to accept Petitioner's Statement of Facts.

On January 20, 1964 at approximately 1:30 A.M., Respondent's tractor trailer struck Petitioner's stopped vehicle on the Lakeland Expressway in Lake County, Ohio. Petitioner's decedent was fatally injured.

The Lakeland Expressway is a four lane superhighway with a median strip dividing the two eastbound lanes from the two westbound lanes. It had been raining and there was a slight mist in the air. (R. 7)

Witness Timothy Prayner left the Shaw Bowling Lanes in East Cleveland in the early morning hours of January 20, 1964 intending to drive east on the Lakeland Expressway to his home in Willoughby. He was driving in the lane next to the median strip or the most northerly lane. (R. 4) As he was passing a vehicle traveling in the lane next to the berm, he noticed it begin to slow up.

After Prayner had passed this slowing vehicle he then saw another vehicle stopped in the lane next to the berm. (id.) On direct examination, he testified that he first saw this vehicle at a distance of approximately 100 feet. (id.) On cross-examination, he indicated that this distance of first notice was only 30 feet. (R. 12-15)

Prayner was unable to state whether or not there were any taillights on the car in which Petitioner's decedent was sitting. (R. 4-6) He passed the stopped vehicle, pulled off the traveled portion onto the berm and also stopped. (id.) After parking his car, Prayner began walking back to the stopped vehicle. At a distance of 50 feet, he first noticed the headlights and saw they were very, very dim. (R. 5) Prayner then saw Petitioner's decedent seated in this stopped vehicle. He was afraid to push the vehicle in which Mrs. Corrigan was seated off the Expressway because he felt it might be hard on his transmission, so he offered to take Mrs. Corrigan to a gasoline station. (R. 9-11) She refused. While Mr. Prayner was present at the accident scene (approximately ten minutes) she attempted to start the car two or three times. (R. 11) The starter sounded like the battery was just about dead. (id.) During the ten minutes that Prayner was present, petitioner's decedent remained in the car. (id.) Several eastbound vehicles passed, one almost striking the stopped vehicle in which Mrs. Corrigan was seated. Prayner thereafter left the scene to obtain assistance from the police. (R. 11)

Mr. Wallace was also eastbound on the Lakeland Expressway at approximately 1:30 A.M. on January 20, 1964. At a distance of approximately one-quarter mile to the east of him, he saw two taillights and a left blinker signal *turn on.* (R. 22) He slowed down to approximately 40 miles per hour and as he was passing this car, thought he recognized it and the driver. (R. 22-24) After he had

passed Mrs. Corrigan, she turned the lights out. (id.) Wallace then continued onto the Lost Nation interchange (approximately 1300 feet, R. 3), exited, entered the westbound entrance, and returned to the scene to find wreckage. This took 1½ minutes. (R. 20)

THE JURY'S FINDINGS.

In response to interrogatories, the jury found that Petitioner's decedent was negligent.

> "In failing to protect her own life by not getting herself off the highway."

The jury further concluded that this negligence was *not* a proximate cause of the death of the Petitioner's decedent.

THE SIXTH CIRCUIT'S HOLDING.

The United States Court of Appeals for the Sixth Circuit held that as a matter of law that the negligence of Petitioner's decedent as found by the jury constituted a proximate cause of her death.

QUESTION PRESENTED.

Did the United States Court of Appeals for the Sixth Circuit circumvent the commandment of the Seventh Amendment to the Constitution of the United States by holding that under the facts of this case reasonable minds could only conclude that the negligence of Petitioner's decedent, as found by the jury, was as a matter of law a proximate cause of her death?

Petitioner's contention is apparently that every case should be submitted to a jury for ultimate determination. If this contention be correct, then every Court in the land has repeatedly violated the Seventh Amendment to the United States Constitution every time a verdict has been

directed in favor of, or against, any party on any issue in any lawsuit.

The plain fact of the matter, of course, is that under the rules of the common law, every Court has the power and more specifically the duty, to direct a verdict in each instance when it becomes apparent that reasonable minds can not differ as to the quality of the evidence adduced.

In the present instance, the jury specifically found that Petitioner's decedent was negligent "in failing to protect her own life by not getting herself off the highway." This was a continuing obligation which commenced sometime after the vehicle became disabled and continued until the accident happened. The jury proclaimed that *the very conduct of Petitioner's decedent in remaining in a position of peril* was negligence. It is not a specific individual act—such as a failure to have taillights. It is rather the *physical position of Petitioner's decedent for an extended time* which the jury found to be unreasonable.

Petitioner advances an ingenious, although insubstantial argument that the findings of the jury might well have an alternative meaning: Petitioner's decedent should have accepted the invitation of Prayner to leave the accident scene and seek assistance.

It should be immediately apparent that the finding of the jury does not purport to consider *the method by which Petitioner's decedent should have left this four lane highway.* The finding simply and conclusively shows that under the circumstances of this accident the dictates of ordinary care, prudence and caution required that Petitioner's decedent leave this position of undoubted peril.[1]

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[1] The evidence disclosed that Petitioner's decedent remained seated in the automobile which was stalled on the main traveled portion of this four lane divided Expressway for a period of time

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In addition, the jury was specifically instructed by the trial judge that, as a matter of law, Petitioner's decedent was *not* negligent in declining Prayner's invitation to leave the accident scene.[2]

The only question presented to the Sixth Circuit was whether the reckless conduct of Petitioner's decedent in remaining on this highway in a position of peril constituted a proximate cause of her death. As stated by the Court of Appeals for the Sixth Circuit:

> "The question then comes down to this: If plaintiff's decedent had not remained in the car on the highway, would she have been injured? There can only be one answer. The conclusion is inescapable that, if Mrs. Corrigan had somehow been able to get her car off the highway there would have been no accident. Likewise, even though the car was left on the highway, if she had been out of the car and off the highway, she would not have been injured. There was

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in excess of the ten minutes that Prayner was present. Weather conditions were adverse, it was night, and her automobile was almost struck by another eastbound vehicle. Thus, there was ample opportunity for Petitioner's decedent "to protect her own life," and as the jury said, she should have.

[2] The trial judge charged the jury:

> "I make reference to these two opinions because there was testimony that the decedent was invited to leave the automobile and go with Praynor [sic], and that she had requested Praynor to use his automobile to push her automobile off of the roadway, which Praynor refused to do. And should you believe that these events did occur as I have related, I instruct you that Shirlee Ann Corrigan was not negligent in declining to leave her automobile to go with Praynor, but instead chose to remain with the automobile." (R. 41)

The dissenting Sixth Circuit justice states that there is no way in which it could be determined that the jury actually followed this instruction of the trial court. Respondent, however, is unaware of any rule of law which would permit any Court to infer that the jury disregarded the instructions of the trial judge in the absence of convincing evidence to the contrary.

> no real issue as to proximate cause. The decisive issue was whether the decedent was negligent in remaining in her stalled car on this heavily travelled expressway. The jury having found on sufficient evidence that she was negligent, proximate cause followed as a matter of law."

The Seventh Amendment does not require a jury determination of all issues. It simply provides that a right to a trial by jury shall not be abridged "otherwise * * * than according to the rules of the common law." Common law and common sense demanded the decision reached by the Sixth Circuit. As stated by the Supreme Court of Ohio in *J. C. Penney Co. v. Robison,* 128 Ohio St. 626 (1934), p. 634:

> "We agree that the right of trial by jury is guaranteed to all citizens by the Constitution of Ohio, and it cannot be invaded or violated by legislative act or judicial decree; but all this does not mean that all cases, regardless of evidentiary aspect, must be submitted to a jury. Under our law it is just as pernicious to submit a case to a jury and permit the jury to speculate with the rights of the citizens when no question for the jury is involved, as it is to deny to a citizen his trial by jury when he has the right."

There is no great, Federal or State principle of law involved in this automobile accident negligence case. The Court of Appeals applied the dictates of common law in reaching the conclusion it did. The mandate of the Seventh Amendment to the Constitution of the United States requires no more.

Respectfully submitted,

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